SUPREME COURT, U. S.

MAR 9 19

JOHN F. DAVIS, C

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1214

DONALD SMELTZ BUTLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

RALPH RUDD,
RUDD, OBER & MILLER,
Public Square Building,
33 Public Square,
Cleveland, Ohio 44113,
Attorneys for Petitioner.

March 9, 1968.

(Attorneys for Respondent on Inside of Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Opinions Below	1
Grounds of Jurisdiction	1
Questions Presented	2
Constitutional Provisions	3
Statutory Provisions	4
Statement of the Case	6
Argument	10
A. Draft Curtails Fundamental Personal Liberties	10
B. Rational Basis Is Test For Commercial Regulation	11
C. Necessity Is Test For Law That Stifles Fundamental Personal Liberties	12
D. Considerations Governing Review on Certiorari	17
E. The Nature of the Evidence	18
F. The Right to Present Evidence of Constitutional Facts	22
1. The Rent Control Cases	23
2. The Shoddy and Bus Franchise Cases	24
3. Whitney v. California	25
4. The Borden and Carolene Cases	25
5. Smith v. California	27
6. Discussion	28
G. Subsidiary Issues	31
Conclusion	32
Appendix:	
Oral Opinion of District Court	1a

Transcript of Sentencing ---------- 13a
Judgment and Commitment ---------- 15a
Opinion of the United States Court of Appeals for the Sixth Circuit ---------- 16a
Judgment of the Court of Appeals for the Sixth Circuit ---------- 28a

TABLE OF AUTHORITIES.

Cases.

Aptheker v. Secretary of State, 378 U. S. 500, 1964 -- 13
Arver v. U. S., the Selective Draft Law Cases, 245 U. S. 366, 1918 ---------- 17
Bertelson v. Cooney, 213 F. 2d 275, 1954 ---------- 17
Block v. Hirsh, 256 U. S. 135, 1921 ---------- 23
Borden's Farm Products Company, Inc. v. Baldwin, 293 U. S. 194, 1934 ---------- 25
Chastleton Corporation v. Sinclair, 264 U. S. 543, 1924 ----------23, 30
Chicago Mercantile Exchange v. Tieken, 177 F. Supp. 660, 1959 ---------- 12
Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U. S. 146, 1919 ---------- 17
Hammond, City of, v. Schappi Bus Line, 275 U. S. 164, 1927 ---------- 24
Katzenbach v. McClung, 379 U. S. 294, 1964 ------ 12
Kress, Dunlap & Lane, Inc. v. Downing, 286 F. 2d 212, 1960 ---------- 30
McCulloch v. Maryland, 4 Wheat. 316, 1819 -------- 17
Meyer v. Nebraska, 262 U. S. 390, 1923 ----------10, 11

NAACP v. Alabama, 377 U. S. 288 ---------- 14, 17, 18

Nebbia v. New York, 291 U. S. 502, 1934 ---------- 12

Shelton v. Tucker, 364 U. S. 479, 1960 ---------- 13, 17, 18

Smith v. California, 361 U. S. 147, 1959 ---------- 27

Thomas v. Collins, 323 U. S. 516, 1945 ---------- 12

U. S. v. Carolene Products Co., 304 U. S. 144, 1938 -- 12

U. S. v. Robel, -- U. S. --, 88 S. Ct. 419, 18 L. ed. 2d 508 ---------- 14, 16

Weaver v. Palmer Bros., 270 U. S. 402, 1926 ---------- 24

Whitney v. California, 274 U. S. 357, 1927 ---------- 25

Constitution and Statutes.

Constitution of the United States:

Art. I, Sec. 8 ---------- 3

Fifth Amendment ---------- 3, 6

Universal Military Training and Service Act, June 24, 1948, c. 625, Title 1, 62 Stat. 604, Public Law 759, 80th Congress (as amended June 19, 1951, c. 144, Title 1, Sec. 1(a), 65 Stat. 75, Public Law 51, 82nd Congress) ---------- 4-5

28 USC Sec. 1254(1) ---------- 1

Other.

Professor Dean Alfange, Jr., "The Relevance of Legislative Facts in Constitutional Law," 114 *University of Pennsylvania Law Review* 637, March, 1966 ---------- 28

Jean Carper, *Bitter Greetings*, Grossman Publishers, 1967 ---------- 30

Congressman Curtis, February, 1967, issue of *Playboy* magazine, page 168 ---------- 20

Federal Rules of Criminal Procedure, Rules 17(c) and 16(b) ---------- 31

How to End the Draft, The Case For An All-Volunteer Army, by Congressmen Stafford, Horton, Schweiker, Shriver, and Whalen, The National Press, Inc., 1967, pp. 113-123 ---------- 19

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

DONALD SMELTZ BUTLER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

OPINIONS BELOW.

District Court: Opinion not reported. Transcript of oral opinion appears in the Appendix hereto at pages 1a to 13a.

Court of Appeals: Opinion reported at ___ Fed. 2d ___. Text is in the Appendix hereto at pages 16a to 28a.

GROUNDS OF JURISDICTION.

The decision of the United States Court of Appeals for the Sixth Circuit was rendered and filed on February 8, 1968.

The jurisdiction of this Court to review by certiorari is conferred by 28 USC Sec. 1254(1).

QUESTIONS PRESENTED.

I. In a criminal prosecution for refusal to report for induction by order of the Selective Service System, does the District Court trying the case have jurisdiction to entertain the defense that at the date of the alleged crime, February 4, 1964, the draft law violated the substantive due process requirement of the Fifth Amendment in that it broadly stifled fundamental personal liberties by conscription of manpower without necessity to do so because the valid Congressional purpose of providing for the common defense by raising and supporting an army could have been achieved as well or better by voluntary means if Congress had taken reasonable steps to provide better incentives for enlistment, chiefly through higher pay and greater opportunities for training and education?

Petitioner answers *yes*. The Court of Appeals answered *no*.

II. In such a case is it a denial of fair trial and reversible error for the trial judge to exclude all of the defendant's evidence tending to show conscription to be unnecessary, bar the defendant from access by subpoena to further such evidence possessed by the government, find the defendant guilty, and sentence him to prison?

Petitioner answers *yes*. The Court of Appeals answered *no*.

CONSTITUTIONAL PROVISIONS.

1. United States Constitution, Article I, Sec. 8:

"The Congress shall have power to lay and collect taxes * * * to * * * provide for the common defense * * * of the United States;

* * *

"To declare war * * *;

"To raise and support armies * * *;

"To provide and maintain a navy;

"To make rules for the government and regulation of the land and naval forces;

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

"* * *

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or offices thereof."

2. United States Constitution, Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

STATUTORY PROVISIONS.

I. Universal Military Training and Service Act, June 24, 1948, c. 625, Title 1, 62 Stat. 604, Public Law 759, 80th Congress.

Section 1(a), 50 USC App. Sec. 451(a) (as amended June 19, 1951, c. 144, Title 1, Sec. 1(a), 65 Stat. 75, Public Law 51, 82nd Congress):

"This act may be cited as the 'Universal Military Training and Service Act.' "

Section 1(b), 50 USC App. Sec. 451(b):

"The Congress hereby declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation."

Section 1(c), 50 USC App. Sec. 451(c):

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 4(a), 50 USC App. Sec. 454(a):

"Except as otherwise provided in this title, every male citizen of the United States * * * who attains the age of 18 years and six months after having been required to register pursuant to Section 3 of this title * * * shall be liable for training and service in the Armed Forces of the United States * * *. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title * * * such

number of persons as may be required to provide and maintain the strength of the Armed Forces.

"* * *"

Section 4(b), 50 USC App. Sec. 454(b):

"Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged * * *."

Section 5(a), 50 USC App. Sec. 455(a):

"The selection of persons for training and service under Section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted * * *."

Section 12(a), 50 USC App. Sec. 462(a):

"* * * any person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both such fine and imprisonment * * *."

STATEMENT OF THE CASE.

Pursuant to the Universal Military Training and Service Act the defendant was ordered to report for induction into the armed forces on February 4, 1964. He failed to do so.

Indicted for this offense, he defends solely on the ground that at the time he was ordered to report for induction the draft law was unconstitutional in that it would have deprived him of his liberty and property and perhaps of his life without due process of law in violation of the Fifth Amendment to the Constitution of the United States. This is so, he says, because the Congressional purpose to provide for the common defense could have been accomplished by less drastic means than conscription, that is, by voluntary enlistment, if the incentives had been improved, chiefly by increased pay and opportunities for training.

Suggesting the truth of this thesis are extensive data and arguments presented in speeches of members of Congress and reproduced in the Congressional Record during the years 1963, 1964 and 1965. Apparently in response to the speeches and perhaps in anticipation of a group of them that were made on April 21, 1964, President Johnson, on April 18, 1964, directed the Defense Department to make a study of the draft selection system "including the possibility of meeting our requirements on an entirely voluntary basis," the study to be completed within a year.

In February, 1966, well in advance of his trial, the defendant moved for leave to subpoena the Secretary of Defense or his designated deputy able to produce the documents to be subpoenaed and to testify authoritatively on them to bring for examination by the parties and their attorneys that portion of the data assembled in

the course of the study that related to certain ideas specified in the proposed subpoena that had been advanced on the floors of Congress and which in the aggregate constituted the defendant's defense.

This motion was denied without opinion.

Thinking that the motion may have been denied because of the lack of specificity of the proposed subpoena as to the precise documents to be produced, the defendant made a second motion in May, 1966, for leave to subpoena a specific document, namely the preliminary draft report of the Defense Department study, which the defendant's attorney was informed had been completed.

This motion was denied likewise.

To the trial the defendant subpoenaed the Secretary of Defense or his designated deputy to produce both the data and the specific report covered by the pre-trial motion. In trial, the Court excluded such testimony from evidence.

Another kind of evidence that defendant subpoenaed for the trial was testimony of an expert, an economist with expert knowledge in this field who would have testified in support of the thesis that the draft could have been supplanted by a system of voluntary recruitment. His testimony also was excluded.

The third class of evidence that the trial court excluded consisted of copies of some of the Congressional speeches previously alluded to, some of them directly from the Congressional Record and some of them as assembled in the report of the hearings on the draft law that were conducted by the House Committee on Armed Services on June 22-24 and June 28-30, 1966. Similar evidence that was also excluded was testimony of certain Congressmen in the same Committee hearing in which they urged that conscription of manpower be replaced by voluntary enlistments.

Excluded also (a fourth class of evidence) was testimony of Assistant Secretary of Defense Robert Morris in the same Committee hearing containing an admission that the necessary manpower could be obtained by voluntary recruitment, although at increased expense.

At the conclusion of the trial the defendant was found guilty and sentenced to five years' imprisonment.

On appeal to the United States Court of Appeals for the Sixth Circuit, the remedy sought was for the conviction to be vacated and the case remanded to the trial court for a new trial, with directions to permit the defendant to subpoena in advance of trial the relevant evidence in the hands of the Government, to receive the relevant evidence bearing on the issue of necessity for the draft, and to determine whether or not conscription was reasonably necessary at the time of the defendant's alleged offense, and if not, to acquit the defendant on the basis of his constitutional defense.

The Court of Appeals responded to this request for relief in the following words:

> "We read, then, appellant's position to be that an issue of fact should be framed between his proffered evidence and the judgment of the Congress as to the necessity of the draft; this issue would then be submitted to a United States District Judge; the District Judge would have the power, upon his own evaluation of the evidence, to conclude that there was a better method of providing for the needed national defense than the one chosen by the national legislature. From this position he would move on to conclude that the availability of this better way rendered unnecessary and *therefore unconstitutional,* the method chosen by Congress.
>
> We do not think the District Judge had any such power, and we agree with his refusal to entertain the

contest presented by appellant. We affirm the judgment of the District Court." Opinion of the Court of Appeals, reproduced in the Appendix to this Petition 16a to 28a, at 23a.[1]

---

[1] There is language in the opinion of the Court of Appeals suggesting that it may have regarded the evidence proffered as insufficient to establish what the defendant claimed it would establish if received and considered:

"But if the evidence proffered to prove unconstitutionality would not in its totality and under a view most favorable to the defendant, prove unconstitutionality, the trial judge does not have to receive it." 17a.

And again:

"There were some stronger expressions of support for an all-voluntary army than what we have set out above. However, appellant's own summing up of the opinions he relies on says '*none* states a firm conclusion that the draft can be abolished and a wholly volunteer force can be maintained at reasonable cost.'" 22a.

On the other hand the Court of Appeals also said:

"Giving this data a view most favorable to appellant's defense, it was to the effect that Congress could have found a better way to raise an admittedly needed Army than the system in force at the time appellant refused to report for induction." 20a.

The evidence that the Court of Appeals refers to as insufficient is that which the defendant was able to present to it in documentary form as exhibits proffered and excluded. These exhibits were summarized in the defendant-appellant's brief to the Court of Appeals. Introducing that summary the defendant-appellant's brief to the Court of Appeals said:

"D. Probable Existence of Facts Claimed.

With the exclusion of the expert testimony and the data subpoenaed from the Department of Defense, the defendant does not claim that the evidence presently before the Court establishes sufficiently the lack of necessity and consequent unconstitutionality of the draft law. However, we believe that the Congressional materials that are before the Court are sufficient to demonstrate that the defendant is not simply shooting in the dark. They seem to demonstrate, indeed, that it is thoroughly reasonable to believe that when the defendant is permitted to obtain and put in his evidence his case will be clearly established."

(Continued on following page)

ARGUMENT.

A. DRAFT CURTAILS FUNDAMENTAL PERSONAL LIBERTIES.

Fundamental to the petitioner's defense is the degree to which the draft curtails the exercise of fundamental liberties. Consider as a checklist the language of *Meyer v. Nebraska*, 262 U. S. 390, 1923, which invalidated a state statute restricting the teaching of foreign languages in public schools. At 362 U. S. 399-400 the Court said:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes liberty guaranteed to the plaintiff in error by this Fourteenth Amendment. 'No state * * * shall deprive any person, of life, liberty, or property without due process of law.' While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those priv-

---

(Continued from preceding page)

It must have been clear to the Court of Appeals that the defendant sought consideration not only of the evidence that he was able to place before the Court of Appeals but also other evidence that the District Court made it impossible for the defendant to present by refusing to hear it even though demanded by subpoena. Moreover, in the third of the statements we quote in this footnote from the Court of Appeals Opinion the Court of Appeals seems to have acknowledged that given a view most favorable to appellant the evidence presented was not insufficient.

We conclude therefore that the judgment of the Court of Appeals affirming the conviction did not rest upon its evaluation of the proffered evidence, but rested solely upon that Court's view of the scope of the District Court's power of judicial review.

ileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [Citing cases.]" *Meyer v. Nebraska,* 262 U. S. 390, 399-400, 1923.

Reviewing the liberties thus listed in *Meyer v. Nebraska* it is plain that military conscription under the Selective Service Act impairs them all. It subjects the draftee to bodily restraint, at least in the sense of being minutely subject to command as to where he shall go and what he shall do. It makes it impossible for him to contract effectively for work and wages. It bars him from engaging in any of the common occupations of life. It prevents him from engaging in any program of formal education that he may have chosen as a civilian. He may marry, but he cannot live with his wife and children. He may worship God but not in his home church nor with the guidance and leadership of his chosen religious leaders and companions. And with respect to those other First Amendment rights, freedom of speech and assembly, the draftee obviously cannot be where he would like to be to speak and assemble with others.

B. RATIONAL BASIS IS TEST FOR COMMERCIAL REGULATION.

The Court below did not discuss the fact that this Court has drawn a clear distinction between the scope of judicial review and the test of unconstitutionality applicable, on the one hand, to commercial regulation affecting only the business interests of those subject to the regulation and the scope and test applicable, on the other hand, to enactments affecting fundamental personal liberties.

With respect to commercial regulation affecting only business interests the test applied is whether "the legislators, in light of the facts and testimony before them

have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce." *Katzenbach v. McClung*, 379 U. S. 294, 1964, at 303-304. See also *Nebbia v. New York*, 291 U. S. 502, 1934; *U. S. v. Carolene Products Co.*, 304 U. S. 144, 1938; *Chicago Mercantile Exchange v. Tieken*, 177 F. Supp. 660, 1959.

C. NECESSITY IS TEST FOR LAW THAT STIFLES FUNDAMENTAL PERSONAL LIBERTIES.

In contrast to the rational basis test for the validity of legislation affecting only business or commercial interests of the challenger is the one applicable to legislation that stifles fundamental personal liberties.

An early articulation of the contrast appears in *United States v. Carolene Products Co.*, 304 U. S. 144, 1938. Footnote 4 of that case is appended to a statement of the rational basis test applicable to "regulatory legislation affecting ordinary commercial transactions." 304 U. S. at 152. The footnote begins as follows:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." See *Stromberg v. California*, 283 US 359, 369, 370; *Lovell v. Griffin*, No. 391 this term, decided March 28, 1938 [303 U. S. 444].

Thomas v. Collins, 323 U. S. 516, 1945, drew the contrast most clearly:

> "In short the state would apply a 'rational basis' test, appellant one requiring a showing of 'clear and present danger.' " 323 U. S. at 527-528.

The Court resolved the conflict as follows, 323 U. S. at 529-530:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider v. Irvington,* 308 US 147; *Cantwell v. Connecticut,* 310 U. S. 296; *Prince v. Massachusetts,* 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *U. S. v. Carolene Products Company,* 304 U. S. 144, 152, 153."

Shelton v. Tucker, 364 U. S. 479, 1960, stated most forcefully the rule applicable to fundamental personal liberties, 364 U. S. at 488:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

The court concluded, 364 U. S. at 490:

> "The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers."

Aptheker v. Secretary of State, 378 U. S. 500, 1964, involved the fundamental personal right to travel. Quoting the language from *Shelton v. Tucker* that we have just quoted, the Court held Sec. 6 of the Subversive Activities

Control Act, forbidding a member of the Communist Party to apply for, use, or be issued a passport, to be unconstitutional because it went beyond what was necessary in order to accomplish the legitimate purpose that Congress had in mind.

In further elaboration of the principle we rest upon, the Court in *Aptheker* quoted *NAACP v. Alabama* as follows, 378 U. S. at 508:

> "It is a familiar and basic principle recently reaffirmed in *NAACP v. Alabama*, 377 U. S. 288, 307, that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' "

On December 11, 1967 this Court decided *U. S. v. Robel*, ____U. S. ____, 88 S. Ct. 419, 18 L. ed. 2d 508, and invalidated the section of the Subversive Activities Control Act which bars members of the Communist Party from employment in defense plants. There, as here, the Act was defended as an exercise of the war power. The Court said, 88 S. Ct. 423-424, 425-426:

> "The Government seeks to defend the statute on the ground that it was passed pursuant to Congress' war power. The Government argues that this Court has given broad deference to the exercise of that constitutional power by the national legislature. That argument finds support in a number of decisions of this Court. However, the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 426. More specifically in this case, the Government asserts that § 5(a)(1)(D) is an 'expres-

sion of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s].' Yet, this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

"When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated. See Schneider v. State of New Jersey, 308 US 147, 161. The Government emphasizes that the purpose of § 5(a)(1)(D) is to reduce the threat of sabotage and espionage in the Nation's defense plants. The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means to implement that governmental purpose in this instance cuts deeply into the right of association. Section 5(a)(1)(D) put appellee to the choice of surrendering his organizational affiliation, regardless of whether his membership threatened the security of a defense facility, or giving up his job. When appellee refused to make that choice, he became subject to a possible criminal penalty of five years' imprisonment and a $10,000 fine. The statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat

feared by the Government in proscribing it. The inhibiting effect on the exercise of First Amendment rights is clear.

"* * *

"* * * Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. Shelton v. Tucker, supra; cf. United States v. Brown, 381 US 437, 461. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less."

Although this line of cases (except for *Robel*) was presented to the Court of Appeals in the defendant-appellant's brief and argument, that court says:

"* * * We are cited to no case, nor does our research yield a case, that would support the proposition urged on us here, to wit: that a court has the power to review the decisions of the executive and the national legislature as to how to provide for the national defense, because the court thinks that it might be *possible* or *probable* that an all-voluntary army could be obtained by offering more pay and other perquisites to voluntary soldiers."

It is true that we have neither cited nor found a case that *holds* that a court can apply the test of necessity to the draft. But we most vigorously disagree with the Court of Appeals statement that no case has been cited that *supports* that proposition. We submit that the cases cited and quoted above do so. Clearly they hold that when an attempted exercise of government power in other areas broadly stifles fundamental personal liberties the test of necessity must be applied. *Robel* holds that test must be applied even when the power exerted is the war power.

The Court of Appeals relied chiefly on four cases to support its decision.

Arver v. U. S., the *Selective Draft Law Cases*, 245 U. S. 366, 1918, was a war-time decision before the modern doctrine arose that necessity is the test of validity for a law invading fundamental personal liberties. Nevertheless it expressly rested the duty of military service and the right to compel it upon *need*.

Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U. S. 146, 1919, involved commercial interests only, and its phrase "unless purely arbitrary" (251 U. S. at 163) expressed the absence of a rational basis.

McCulloch v. Maryland, 4 Wheat. 316, 1819, also was a commercial case, and, of course, antedated the modern rule.

Bertelson v. Cooney, 213 F. 2d 275, 1954, discussed due process only in terms of discrimination. It acknowledged that the power of conscription rests upon necessity. Its declaration that Congress is the sole judge of necessity missed the signposts that should have been seen in *U. S. v. Carolene Products Co.* and *Thomas v. Collins.* That declaration has been blazingly overruled by *Aptheker* and *Robel*, and impliedly overruled by the state action cases, *Shelton v. Tucker* and *NAACP v. Alabama*, all *supra*.

D. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

Rule 19 of the Supreme Court Rules indicates that certiorari will be granted only where there are special and important reasons therefor. It is indicated that one of the possible reasons for granting certiorari is that a Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

We urge that if our issue is stated broadly this has happened here. Stating it broadly, we would say that the issue is whether a district court has jurisdiction to consider whether the purpose of a Congressional enactment "can be more narrowly achieved" by "less drastic means for achieving the same basic purpose" when the existing enactment "broadly stifle[s] fundamental personal liberties," *Shelton v. Tucker,* 364 U. S. at 488, and deeply "invade[s] the area of protected freedoms," *NAACP v. Alabama,* 377 U. S. 288, at 307.

Stated broadly in this fashion the issue clearly is one that the Court of Appeals has decided in a way in conflict with applicable decisions of this Court.

Another reason for granting certiorari set forth in Rule 19 is that a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

This test is satisfied if the issue of this case is stated narrowly as whether the necessity for the *draft* is reviewable by a federal court because the *draft* broadly stifles fundamental personal liberties and deeply invades the area of protected freedoms.

E. THE NATURE OF THE EVIDENCE.

We do not see the issue now before this Court as one that requires a deep or extensive consideration of the evidence that was presented below. But enough should be said about it in this petition to demonstrate that there is substantial evidence available and that the defendant-petitioner's claim is not a frivolous one.

At the time of the defendant's trial in August, 1966, the evidence available to him was from two sources, the speeches and testimony of a substantial number of Congressmen arguing for abolition of the draft, and testimony

of Assistant Secretary of Defense Robert Morris before the House Committee on Armed Services in June, 1966, disclosing some of the findings of a Defense Department study initiated by order of the President on April 18, 1964. The speeches and testimony of the members of Congress and the testimony of Secretary Morris were offered in evidence at the trial in the District Court, and, of course, were part of the record before the Court of Appeals. They were summarized in detail in the defendant-appellant's brief to the Court of Appeals. We offer here only a statement of the conclusions that may be drawn from this body of evidence.

It is clear that there is a substantial body of opinion among the members of Congress who have studied the draft that it would be highly desirable to abolish it and to rely upon a wholly volunteer force. None of them wants to weaken nor undermine the strength or quality of our national defense in the process, and none states a firm conclusion that the draft can be abolished and a wholly volunteer force can be maintained at reasonable cost.[2]

However, many of them point out that whatever increase in cost there might be in raising salaries in the armed forces to attract more volunteers would be at least partially offset by the economies of reducing turnover and thus reducing training cost, employing civilians or civilian contractors to perform more of the administrative and supply functions, delegating to civilian institutions the teaching of skills needed by the military that have civilian counterparts, and improving the efficiency of military operations in other respects, such as by fitting assignments to abilities more closely.

Many of the members of Congress point out that incentives other than increased pay can also be used to help

---

[2] But see *How to End the Draft, The Case For An All-Volunteer Army,* by Congressmen Stafford, Horton, Schweiker, Shriver, and Whalen, The National Press, Inc., 1967, pp. 113-123.

attract volunteers. Among the suggestions are improved opportunities for education and the learning of job skills before, during and after military service; and improved recruiting and public relations activities.

Many of the Congressmen believe it likely that by combining monetary and non-monetary incentives the increased costs of a wholly voluntary force could be kept within the limit of the savings that it and other economies could bring about, or at least that the net increase in cost would be modest.

Assistant Secretary Morris, presenting the Defense Department viewpoint, concludes in his summary of the Defense Department study that the net increase in cost would range between $4 billion and $17 billion. It is not clear however that this estimate, enormously wide as it ranges, takes into account all of the possible economies that the Congressmen suggest.

Not available for the trial, but presented to the Court of Appeals in the defendant-appellant's brief there was comment by Congressman Curtis upon Assistant Secretary Morris's testimony. Congressman Curtis's comment is found in the February, 1967, issue of *Playboy* magazine on page 168:

> "The Department claims it would cost too much to rely entirely on volunteers. Its latest cost estimates—taken from a report offered by Assistant Defense Secretary Thomas D. Morris at the June draft hearing—range from 4 billion dollars to 17 billion dollars. However, the Department bases its figures, which are almost so vague as to be ridiculous, on its estimates of what it would cost to 'hire' 500,000 new men annually without any other changes in military policies. The Department later wrote me that 'no estimates were made for the draft study of the combined effects of improvement in fringe benefits upon the rate of volunteering * * * since these benefits—

with the exception of training and educational opportunities—were not found to be effective inducements for initial enlistment' (Emphasis added). Thus, the military establishment has erected an artificial monetary barrier to a volunteer Army, for it has failed to consider the large increase in re-enlistments and concomitant savings that would result from improvement in pay and other benefits.

"Bruce Chapman, using 1965 figures leaked from the Pentagon study, has estimated that a pay increase totalling 3 billion dollars would reduce—through higher re-enlistments—the number of new army personnel needed each year from 500,000 to 150,000. Greater fringe benefits and other improvements in military life could bring the number down even further. At the same time, the military would save at least 2.1 billion dollars in annual training costs by retaining the 350,000 men who otherwise would have left after their first hitch.

"Further savings would result from using existing civilian training establishments, including college campuses, vocational schools and on-the-job training programs, to train military personnel. As nearly 90% of the technical skills used by the military are also employed by the civilian economy, military training programs could be reduced to the training of only the 10-20 percent of combat and combat-support jobs (field maintenance, ordnance, battalion-level supply, etc.) that need military, as opposed to vocational, training. The resultant savings for the military could be extensive. Such a program would also be a stimulus to increased business investment in our manpower resources and could produce a greater number of skilled workers for the civilian economy."

Clearly Assistant Secretary Morris's estimates as to the increased costs of a wholly volunteer force cannot be accepted at face value without further examination and cross-examination. The present petitioner was thwarted in

his effort to accomplish such a probing of the findings of the Defense Department study by the refusal of the trial court to permit it either before or at the trial.

The petitioner was further thwarted by the trial court's refusal to permit testimony by a knowledgeable expert. These refusals, on top of the trial court's refusal to receive even the Congressional evidence that is summarized here, completely destroyed the petitioner's opportunity to defend himself against the indictment.

In the next section of this petition we shall demonstrate briefly that precedents overwhelmingly support the proposition that an issue of constitutionality such as we present here, however formidable the task, must be determined on the basis of evidence, when evidence is offered, including, where appropriate, expert testimony, rather than on the basis of the presumption of constitutionality or of the court's generalized knowledge of the American scene.

Although many of the cases we shall cite dealt with matters of commercial regulation for which, as we have seen, the appropriate test is rational basis, the obligation to examine the evidence must be held to be even stronger where, because of the statute's deprivation of fundamental personal liberties, the test of constitutionality is that of necessity, for unless the deprivation of personal liberty is found to be reasonably necessary it denies the substantive due process promised by the Fifth Amendment.

F. THE RIGHT TO PRESENT EVIDENCE OF CONSTITUTIONAL FACTS.

Petitioner's defense is a claim of fact, constitutional or legislative fact rather than adjudicative fact, to be sure, but nevertheless susceptible of proof by evidence. Such evidence, if offered, should be received, and the facts should be found as the basis for the Court's judgment.

The full scope of the doctrine has grown up gradually over several decades. In the summary that follows we approach it chronologically.

1. The Rent Control Cases.

Block v. Hirsh, 256 U. S. 135, 1921, was an eviction suit. The tenant claimed the protection of the District of Columbia rent control law. Justice Holmes held the measure was justified by the war-time emergency conditions. He discussed the fact, apparently on a judicial notice basis, at some length, observing:

> "No doubt it is true that a legislative declaration of facts that are material only as a ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts."

Chastleton Corporation v. Sinclair, 264 U. S. 543, 1924, was a suit to enjoin enforcement of an order reducing the rents for the plaintiff's apartment house. Justice Holmes said, 264 U. S. 547-549:

> "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed. * * *
>
> "* * * In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended. * * * Without going beyond the limits of judicial knowledge, we can say at least that the plaintiff's allegations cannot be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end.
>
> "* * * Obviously, the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the

District than here. The evidence should be preserved, so that, if necessary, it can be considered by this Court."

2. The Shoddy and Bus Franchise Cases.

Weaver v. Palmer Bros., 270 U. S. 402, 1926, was a suit to enjoin enforcement of a Pennsylvania statute forbidding the use of shoddy (reclaimed textile fibers) in the manufacture of bedding and upholstery. Mr. Justice Butler, for the Court, made the following statement, 270 U. S. at 410:

"The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause or the equal protection clause. The answer depends on the facts of the case. Legislative determinations express or implied are entitled to great weight; *but it is always open to interested parties to show that the legislature has transgressed the limits of its power.* Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413. *Invalidity may be shown* by things which will be judicially noticed (Quong Wing v. Kirkendall, 223 U. S. 59, 64, or *by facts established by evidence.*" (Emphasis added.)

From the evidence the Court concluded that the prohibition of the use of shoddy was unnecessary in order to accomplish the legislative purpose of preventing the spread of infection. Thus the law was invalid and the injunction restraining the enforcement of the law was upheld.

In *City of Hammond v. Schappi Bus Line*, 275 U. S. 164, 1927, a suit to enjoin an enforcement of an ordinance of the city restricting the plaintiff's right to operate its buses on the city streets, the Court directed the District Court to take evidence as a basis for constitutional decision.

3. Whitney v. California.

Whitney v. California, 274 U. S. 357, 1927, sustained a conviction for violation of California's criminal syndicalism act. In a separate concurrence Mr. Justice Brandeis held that a legislative declaration

> "does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. * * * Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the state, creates merely a rebuttable presumption that these conditions have been satisfied.
>
> "Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the Court or the jury." 374 U. S. 378-379.

4. The Borden and Carolene Cases.

Borden's Farm Products Company, Inc. v. Baldwin, 293 U. S. 194, 1934, sought to enjoin enforcement of the pricing provisions of the New York Milk Control Law. The trial court dismissed the case for failure to state a cause of action but the Supreme Court remanded it for evidence to be taken and the facts to be found. The Court said, 293 U. S. 209-210:

"Respondents invoke the presumption which attaches to the legislative action. *But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such it is a rebuttable presumption.* * * * It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault * * *.

"* * * But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, *these facts are properly the subject of evidence and of findings.* With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, *it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support.*" (Emphasis added.)

U. S. v. Carolene Products Co., 304 U. S. 144, 1938, sustained a Federal statute barring from interstate commerce what were called filled milk products, that is, skimmed milk in which the butter fat was replaced with vegetable fat. The decision was based upon constitutional facts put into evidence in the trial court. Mr. Justice Stone said, 304 U. S. 152-153:

"We may assume for present purposes * * * that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

* * *

"Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing those facts have ceased to exist. *Chastleton Corp. v. Sinclair,* 264 U. S. 543."

5. Smith v. California.

Smith v. California, 361 U. S. 147, 1959, invalidated a Los Angeles ordinance prohibiting possession of obscene matter because it failed to require any scienter on the part of the book seller-defendant as to the contents of the book. In a separate concurrence Mr. Justice Frankfurter urged that in the trial the defendant should have been permitted to introduce expert testimony regarding the prevailing literary and moral community standards. He said, 361 U. S. 165:

"* * * To exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process."

Mr. Justice Harlan in his concurrence agreed with Frankfurter that

"due process * * * requires a state to allow a litigant in some manner to introduce proof"

as to contemporary community standards. But he would not have insisted upon testimony of experts as the only available means of proof. He said, 361 U. S. 172:

"In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside *every* attempt by appellant to introduce evidence

bearing on community standards. The exclusionary rulings were not limited to offered expert testimony. This had the effect of depriving appellant of the opportunity to offer any proof on a constitutionally relevant issue. On this ground I would reverse the judgment below, and remand the case for a new trial."

6. Discussion.

In this case no court could be expected to have at its fingertips the mass of legislative, historical, and statistical data that the Congressional material shows need to be considered in determining the question of the necessity of the draft. A refusal to consider the evidence is a withdrawal from performance of the judicial function.

We have found helpful thinking on this matter by Professor Dean Alfange, Jr. in his article "The Relevance of Legislative Facts in Constitutional Law," 114 *University of Pennsylvania Law Review* 637, March, 1966. He says at pages 643-644:

"It may readily be granted that questions relative to the wisdom or appropriateness of, or the public interest or public need behind, legislative enactments are usually settled finally by legislative judgment. If questions of constitutional authority are not raised, such legislative facts are not material to the validity of the statute. If the authority to enact a federal law is found within the delegated powers of Congress, and the law cannot reasonably be said to violate any of the constitutional prohibitions on congressional action, it is enough that Congress has seen a need and has acted to meet it. But where the exercise of legislative power approaches a constitutionally prohibited area, as in legislation restricting speech, the question of need becomes crucial, and no sound constitutional judgment can be made except by consideration of legislative facts. A law which appears on its

face or in application to constitute an abridgment of speech—or a prohibition of the free exercise of religion, or denial of the equal protection of the laws by a state, or a state obstruction of interstate commerce, or that has any other effect that the federal or state governments are constitutionally forbidden to achieve —must be justified in terms of an overriding public need relative to the extent of the abridgment. Unless the court is to adopt the absolutist position, and refuse to accept any justification for the law, or to decline to enforce the constitutional prohibition by adopting the position of self-restraint and accepting any superficially plausible justification, it must examine the sufficiency of the justification put forward. This may perhaps be described as questioning the judgment of the legislature as to the wisdom or appropriateness of the legislature's enactments, but it is nonetheless an unavoidable exercise of the court's political responsibility.

"Doubtful constitutional questions can never be answered entirely irrespective of legislative considerations of public need."

At page 648 of his article Professor Alfange presents the following discussion:

"It must be granted that constitutional arguments based on necessity may be open to suspicion. Mr. Justice Jackson, in rejecting the government's contention in the steel seizure case of 1952, thus commented: 'The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.' Because of its ready availability to totalitarian regimes to justify abandonment of the rule of law, the idea that 'necessity knows no law' excites a natural abhorrence. But one need not accept all implications of this idea—although it is certainly true that as necessity becomes increasingly desperate for individuals or nations it becomes

increasingly unrealistic to expect strict observance of settled legal rules, a fact that Mr. Justice Jackson expressly recognized elsewhere. What must be conceded is that law must be kept abreast of social necessity, and that just as Congress has the responsibility of keeping statutory rules in line with current social needs, the Supreme Court has the responsibility of insuring that the Constitution does not become an insurmountable barrier to the accomplishment of valid and essential national goals."

We suggest that in spite of its abhorrent extension of governmental power over the lives of our citizens,[3] the draft has been accepted as constitutionally valid in the past because of the feeling that the courts have shared with Congress and the people that conscription was necessary to national survival. Certainly this was the feeling that sustained conscription during the Civil War, and World Wars I and II. And peacetime conscription since World War II undoubtedly was supported by a similar feeling amidst the tensions of the cold war, though it has not existed without dissent, as Congressman Curtis manifests.

But it is necessary to be on guard lest old assumptions keep us from examining new facts. The Congressional materials presented in this case argue repeatedly that the changing technology of warfare made the peacetime conscription of 1964 inefficient, wasteful, ineffective for defense purposes, and—the crucial constitutional fact—unnecessary.

A law valid at one time may cease to be valid when the facts change. *Chastleton Corp. v. Sinclair,* 264 U. S. at 547, 1924. *Kress, Dunlap & Lane, Inc. v. Downing,* 286 F.2d 212, 1960.

---

[3] See Jean Carper, *Bitter Greetings,* Grossman Publishers, 1967.

So far as we have been able to find no court has ever been presented, except in this case, with a thorough factual challenge to the necessity of the peacetime draft. Perhaps no such challenge as we make here could have been made much earlier than this. Perhaps it is only with recent technology and population growth that the challenge has become possible. Moreover, so far as we know, it is only the work of the members of Congress that has made readily available the factual data necessary for evaluating the challenge. The product of that work is what we are presenting to this Court. Thus the fact that the draft law has not already been overthrown should not bar its validity from being seriously considered in this case.

G. SUBSIDIARY ISSUES.

Presented in the courts below and fairly comprised within the questions that this petition brings to this Court were several subsidiary issues which the Court of Appeals did not discuss in its opinion and which we therefore deem it unnecessary to present in detail to this Court now. However, if this petition is granted and the case is remanded for trial on the evidence, it may be that the trial court should be instructed by this Court as to the admissibility of the several kinds of evidence that were offered below and as to the right of the defendant to ascertain by subpoena in advance of trial what evidence is available in the hands of the government. These matters involve questions of governmental privilege, appropriateness of expert testimony, judicial notice of the Congressional materials, and the applicability of rules 17(c) and 16(b) of the Federal Rules of Criminal Procedure.

Unless this Court directs otherwise in granting this petition for certiorari these matters will be presented in our brief on the merits.

CONCLUSION.

The defendant-appellant says he is not guilty because the Selective Service Act which he is held to have violated is unconstitutional. It is unconstitutional, he says, because at the time of his failure to report for induction conscription was not reasonably necessary as a means of raising an army or providing for the national defense. Because conscription under the Selective Service Act deeply impairs and inhibits exercise of fundamental personal liberties guaranteed by the first Ten Amendments of the United States Constitution it can be permitted under the substantive requirements of the due process clause of the Fifth Amendment only if it is reasonably necessary. It is not sufficient to sustain it that there may be a rational basis for the Act.

The petitioner offered evidence that in 1964 conscription was unnecessary since armed forces of equal effectiveness could have been provided by wholly voluntary means. This evidence was totally excluded by the trial court, and the exclusion was affirmed by the Court of Appeals on the ground that a District Court does not have jurisdiction to provide judicial review of the Congressional determination that the draft was necessary. This holding was an abdication of the judicial function and a denial of procedural due process to which the defendant-petitioner was entitled, a complete exclusion of the defense that he sought to make to his criminal indictment.

Stated narrowly, the question is one which has not been settled by this Court but should be. Stated broadly, the question decided by the Court of Appeals was decided there in conflict with applicable decisions of this Court. In a procedural sense the courts below have so far departed from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision.

The petition for certiorari should be granted.

Respectfully submitted,

RALPH RUDD,
Attorney for the Petitioner.

RUDD, OBER & MILLER,
Of Counsel.